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Supreme Court, U.S.
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No. 09-614

IN THE
SUPREME COURT OF THE UNITED STATES

CLAYTON L. BABCOCK, DENISE J. ALEXI, MARIE G. HARDOUIN, AND KRISTY COPELAND,

Petitioners,

v.

ARTHUR J. GALLAGHER & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit failed to apply the correct standard of appellate review when the Fifth Circuit disregarded the District Court's factual findings that the geographic description in the restrictive covenants at issue were overbroad and failed to comply with La. R.S. 23:921 and erroneously concluded that the District Judge's findings of fact may have been believed that the covenant was invalid *per se,* even though the District Judge specifically cited the undisputed facts establishing that the covenant was impermissibly overbroad and never stated that the covenant was overbroad *per se*.

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INTRODUCTION

In a decision that defies established precedent for review of a trial court's findings of fact and conclusions of law, the Fifth Circuit chose to disregard the trial judge's determination that a non-competition agreement was overly broad because it impermissibly listed all 64 Louisiana parishes when only nine could be listed as a matter of law and under the contract between the parties. Louisiana law requires such non-competition agreements list only the " ... specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein ..." Both the employer, Arthur J. Gallagher & Co., and the employees, Petitioners herein, introduced evidence in the trial court establishing that the employer and the Petitioners conducted a like business in only nine parishes. The trial court correctly found that the listing of all 64 Louisiana parishes was therefore impermissibly overbroad and violated Louisiana law.

Rather than defer to that finding of fact made by the District Court, the Fifth Circuit surmised that the trial judge *might* have thought that any listing of all 64 parishes in such restrictive covenants was invalid *per se*, despite the fact that the District Court did not so rule. Such a finding was not necessary by the District Court inasmuch as the undisputed evidence established that the employer's listing of all 64 parishes was overbroad.

The Fifth Circuit did *not* hold that listing all 64 parishes in a non-competition agreement was valid under these facts. Nor did the Fifth Circuit hold that the District Court erred in denying the employer's request to reform the overly broad geographic listing to comply with Louisiana law. Instead, the Fifth Circuit vacated the District Court's decision and remanded the case to the trial court, and the new judge now assigned to the case, for further proceedings, i.e. to start over.

Petitioners respectfully request that a writ of certiorari issue to review the *per curium* Opinion of the United States Court of Appeals for the Fifth Circuit, entered in *Gallagher v. Babcock,* No. 08-30560, on July 20, 2009. Review on writ of certiorari is warranted because the Fifth Circuit failed to apply the proper standard of review of the District Court's judgment.

OPINIONS BELOW

The June 5, 2008 Order of the United States District Court for the Eastern District of Louisiana is unpublished and is reprinted in the Appendix (App.) at 16. The *per curium* Opinion of the Fifth Circuit Court of Appeals is reprinted on at App. 4 and is not otherwise published. The Fifth Circuit Court of Appeals order denying the petition for rehearing is also unpublished and is reprinted at App. 3. The Fifth Circuit Court of Appeals Judgment, issuing a mandate to the trial court, is also unpublished and is reprinted at App. 1.

JURISDICTION

The United States District Court for the Eastern District had jurisdiction over Respondent's claims under 12 U.S.C.A. §1332. The United States Court of Appeals for the Fifth Circuit had jurisdiction to review the District Courts' denial of a preliminary injunction pursuant to 28 U.S.C.A. §1292(a)(1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 52(a) provides in pertinent part:

> (a) Findings and Conclusions.
>
> (1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.
>
> . . .
>
> (6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to

the trial court's opportunity to judge the witnesses' credibility.

Louisiana Revised Statute 23:921 provides in pertinent part:

> A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.
>
> . . .
>
> C. Any person ... who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein not to exceed a period of two years from termination of employment.

STATEMENT OF THE CASE

Clay Babcock is an insurance broker operating in the employee benefits segment of the industry. He previously owned and operated a small but successful company, Babcock Consulting, Inc. In

November 2003, Babcock sold his business to another insurance brokerage, Arthur J. Gallagher & Co. (Gallagher), which is one of the largest brokers in the industry. The parties agreed that Babcock as well as his employees, Denise Alexi and Marie Hardouin, would become employees of Gallagher.

At that time, Babcock executed with Gallagher a Purchase Agreement defining terms of the sale and Babcock contemporaneously executed an Employment Agreement with Gallagher. Alexi and Hardouin signed similar employment agreements, entitled Executive Agreements. The Employment Agreement and the Executive Agreements contained a restrictive covenant prohibiting certain contact with customers for whom Babcock had performed services or solicited business in the two years prior to the termination of the Employment Agreement.

Four years later, Babcock was offered an opportunity to start a benefits business at Ellsworth Corporation in December 2007. Babcock pursued this opportunity and resigned from Gallagher on January 2, 2008. Ellsworth Corporation subsequently made offers of employment to Denise Alexi and Marie Hardouin, who accepted. Another Gallagher employee, Kristy Copeland, left Gallagher to work at Ellsworth several months before Mr. Babcock resigned from Gallagher, though Babcock and Copeland did not discuss either's departure.

In response to Babcock and the other Petitioners' departure, Gallagher filed this lawsuit

on January 8, 2008 in the United States District Court for the Eastern District of Louisiana. Gallagher sought to enjoin Petitioners from competing with Gallagher or soliciting any clients of Gallagher, based on the Employment Agreement and Executive Agreements executed by Petitioners.

The restrictive covenant at issue in the Employment Agreement provides:

> Section 8. Protection of Corporation's Business.
>
> (a) The Executive recognizes the Corporation's legitimate interest in protection, for a reasonable period of time following the termination of the Executive's employment, those corporation accounts with which the Executive will be associated during his employment. Accordingly, the Executive understands and agrees that for a period of two (2) years following the termination of this employment for any reason whatsoever, he will not, directly or indirectly, solicit, place, market, accept, aid, counsel or consult in the renewal, discontinuance or replacement of any insurance (including self-insurance) by, or handle self-insurance programs, insurance claims, risk management services or other insurance administrative or service functions for, any Corporation account

> for which he performed any of the foregoing functions during the two year period immediately preceding such termination in those parishes and municipalities designated on Addendum II attached hereto. For purposes of Sections 7 and 8 hereof, all references to "Corporation" shall be deemed to include the Acquired Business.

Addendum II was attached to the Agreement. That Addendum listed all 64 Louisiana Parishes.

At the January 31, 2008 hearing, which took place prior to the scheduling of a trial on the Motion for Preliminary Injunction, the District Court entertained argument and received evidence solely as to the validity of the restrictive covenant in the contracts at issue. After argument and thorough briefing of the legal issues, the District Judge held that the agreements were overly broad and therefore invalid and unenforceable. App. 46. Gallagher then filed an appeal with the Fifth Circuit Court of Appeals, seeking to reverse the District Judge's ruling that the restrictive clauses were unenforceable.

In its July 20, 2009 *per curium* Opinion, the Fifth Circuit stated: "In sum, the district court essentially found the provisions to be unenforceable *per se* because they named every Louisiana parish." App. 12. However, the District Court's Order and Reasons did not state that it found a geographic

listing of all 64 parishes to be invalid *per se*. The District Judge conducted an extensive analysis of the validity of the non-compete agreement in his Order and Reasons. App. 29-46. After reviewing the general principles of law on this subject, the District Court noted that the Respondent, Gallagher Benefit Services, Inc., "performs insurance benefit services work and that Defendants performed such work for Plaintiff in nine parishes across Louisiana." App. 35. This finding was predicated on the undisputed evidence submitted by Respondent and Petitioners in the District Court.

It is undisputed that the Louisiana courts have consistently held that La. R.S. 23:921 must be strictly construed. *SWAT 24 Shreveport Bossier, Inc. v. Bond*, (La 6/29/01), 2000-1695, 808 So.2d 294, 298. It is also undisputed that Louisiana law requires that agreements containing restrictive employment covenants must be strictly construed. *Id.* La. R.S. 23:921(C) specifically disallows a geographic description which lists parishes in which the employer is not conducting a like business:

> Any person ... who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long

> as the employer carries on a like business therein .... [emphasis added.]

It cannot be disputed that the United States District Court was correct in finding that the restrictive covenant at issue was overbroad and violated La. R.S. 23:921(C) as it listed 64 parishes instead of only the nine parishes which legally could have been listed. As a matter of Louisiana law, listing 64 parishes when only nine were eligible renders the restrictive covenant invalid. La. R.S. 23:921(A)(1). No party sought a determination from the District Court that listing all 64 parishes in such a restrictive covenant made the agreement invalid *per se*. Nor was such a determination made by the trial court. Nor was such a determination necessary to the claims or defenses presented by the court.

The District Court's judgment, as stated in its Order and Reasons, did not hold that the restrictive covenant at issue was invalid *per se*. Rather, it held that the facts established that this particular restrictive covenant was overly broad under Louisiana law and therefore unenforceable. Respondent introduced in evidence an affidavit establishing that Petitioners only performed services in nine parishes. App 35. Petitioners introduced testimony in the District Court that they performed functions for Gallagher's clients in those nine parishes. Thus, it was not disputed in the District Court that Petitioners performed employment benefit insurance services for clients at issue in nine particular Louisiana parishes. The District Court

specifically acknowledged that evidence in its Order and Reasons. *Id.*

In issuing the July 20, 2009 decision, the Fifth Circuit violated a fundamental principle of appellate review when it disregarded the District Court's citation to the evidence, and conclusions based thereon, in the District Court's analysis in finding the restrictive covenant was overbroad and thus invalid. Further, the Fifth Circuit applied an improper standard of review when it erroneously assumed that the District Judge ignored the evidence and speculated that District Court determined that any geographic description listing all 64 Louisiana parishes is invalid *per se*. Clearly, the District Judge's written ruling does not make such a finding.

Thus, the United States Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings warranting this Court's issuance of a writ of certiorari to review the Fifth Circuit's *per curium* Opinion.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Fifth Circuit's *per curium* Opinion directly conflicts the fundamental principle of the standard of appellate review of factual determinations as set forth by the Federal Rules of Civil Procedure and by this Court. Fed. R. Cir. P. 52(a); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504 (1985).

By disregarding the District Court's analysis, the Fifth Circuit failed to give the District Court the appropriate deference and exceeded its role as a reviewing court. Accordingly, in issuing the July 20, 2009 decision the United States Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings, requiring this Honorable Court to exercise its supervisory power.

I. CERTIORARI IS WARRANTED BECAUSE THE COURT OF APPEALS FOR THE FIFTH CIRCUIT FAILED TO GIVE DEFERENCE TO THE DISTRICT COURT'S FACTUAL FINDINGS.

Certiorari should be granted because the Fifth Circuit disregarded the proper role of appellate court in reviewing the District Court's findings of fact. Federal Rule of Civil Procedure 52(a) provides: "[f]indings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court." Determining the weight of the evidence "is the special province of the trier of fact." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982).

In reviewing a trial court's ruling on the evidence, this Honorable Court stated in *Anderson v. City of Bessemer City, N.C.* 470 U.S. 564, 573, 105 S.Ct. 1504 (1985):

> This [clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier

> of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982). [emphasis added.]

In its July 20, 2009 *per curium* Opinion, the Fifth Circuit Court of Appeals stated: "In sum, the

district court essentially found the provisions to be unenforceable *per se* because they named every Louisiana parish." App. 12. However, nowhere in the District Judge's Order and Reasons did he state that he found a geographic listing of all 64 parishes to be invalid *per se*. Rather, the District Court held that the facts established this particular restrictive covenant was overly broad and therefore unenforceable. After reviewing the general principles of law on this subject (App. 29 - 32), the District Judge found that the facts established Gallagher Benefit Services, Inc. "performs insurance benefit services work and that Defendants performed such work for Plaintiff in nine parishes across Louisiana." App. 35.

The restrictive covenants at issue in the Employment Agreement (App. 22 - 25) and the three Executive Agreements (App. 25 - 29) are specifically and unequivocally limited to customer accounts for whom the Petitioners actually performed services or actively solicited business. It is undeniable that Respondent introduced evidence admitting that it performed employee benefit services for clients in only nine parishes. The parties were in absolute agreement that Petitioners performed their work for clients in only nine parishes. App. 34 - 35.

As the geographic listing in the restrictive covenant at issue listed all 64 parishes, the District Court correctly held that under Louisiana law, the geographic listing was overbroad. The Court of Appeals did not find this decision to be legally incorrect.

Despite the District Court's clear reasoning based on undisputed evidence, the Fifth Circuit failed to give the District Court's factual findings the appropriate deference. Instead, the Fifth Circuit erroneously stated that it believed that what must have occurred in the court below was that District Judge felt, even though he did not so state, that any geographic description listing of all 64 Louisiana parishes is invalid *per se*.

There is no legal authority for the Court of Appeals to disregard the District Court's factual conclusions, to theorize what may have been in the District Judge's mind, but not stated in his written decision. When Fifth Circuit failed to defer the District Court's reasonable factual findings, in the face of the legal duty to do so, the Court of Appeals departed from the accepted and usual standard of review requiring deference to factual findings in the trial court. That error requires this Honorable Court to exercise its supervisory power.

II. CERTIORARI IS WARRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT APPLIED AN IMPROPER STANDARD OF REVIEW TO THE DISTRICT COURT'S CONCLUSIONS OF LAW.

Certiorari should be granted because the Fifth Circuit's *per curium* Opinion violated a fundamental principle of appellate review of the District Court's

conclusions of law based on its findings of fact. The District Court held that the fact that the restrictive covenant listed all 64 parishes when only nine were eligible rendered the covenant invalid and unenforceable as a matter of Louisiana law. The District Court further held that, under the circumstances, the overly broad restrictive covenant should not be reformed to list only the nine eligible parishes.

The record reveals an adequate basis in the evidence for the District Court's holding that the geographic description was overbroad and therefore failed to conform to La. R.S. 23:921. The District Court was correct in holding that, under those facts, the covenant did not comply with Louisiana law. The Fifth Circuit misapplied the clearly erroneous standard of review when it refused to acknowledge District Court's rationale in holding that Louisiana law required the legal conclusion that the restrictive covenant was invalid in light of the fact that the geographic listing was overbroad. The District Court specifically relied on undisputed evidence submitted by both parties in determining that the restrictive covenant was overbroad and therefore failed to conform to the statute. App. 34 - 35. The District Judge gave no indication whatsoever that he either ignored, discounted, or did not consider that evidence in finding the covenant was invalid. Rather than considering whether those conclusions of law were correct in light of the factual findings, the Court of Appeal attempted to glean what the District Judge might have been thinking about whether any listing of 64 parishes could ever be

proper, and if it could, what bearing it might have on the District Judge's application of the law to the undisputed facts. Simply put, it is of no moment whether the District Judge thought, as the Court of Appeal suggests, that any listing of all 64 parishes was invalid *per se*, as the facts clearly establish that the restrictive covenant in this case was overbroad.

There is no basis in the law governing appellate review for presuming that the District Court ignored the factual evidence that supported its decision, particularly when the District Court cited that evidence as the basis for its decision. There is also no basis in the law for the Court of Appeals to speculate that the District Court made its decision based on a theory that any geographic description listing all 64 Louisiana parishes is invalid *per se*. This is particularly true as the District Judge did not state in his written decision that a geographic description listing all 64 parishes is invalid *per se*, or that such a determination would have been operative in his conclusions of law and judgment.

In overlooking the District Court's analysis, the Fifth Circuit exceeded its role as a reviewing court and ignored the settled rule that "[w]here there two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); *See also, Anderson*, 470 U.S. at 573-74; *Zenith*, 395 U.S. at 123.

Accordingly, the Court of Appeals for the Fifth Circuit violated the fundamental principle of

appellate review in determining whether the trial judge erred as a matter of Louisiana law in concluding that the restrictive covenant was overbroad, thus warranting the exercise of this Court's supervisory power.

CONCLUSION

Certiorari should be granted because the United States Court of Appeals for the Fifth Circuit failed to defer the District Court's factual findings, and failed to determine whether its conclusion of law based on those factual findings was correct, in violation of fundamental principles of appellate review.

The District Court was correct in holding that the restrictive covenant at issue was overbroad as it listed all 64 parishes instead of only the nine parishes which both the agreements at issue and the controlling statute, La. R.S. 23:921(C), would permit to be listed. The Fifth Circuit disregarded the District Judge's thorough analysis of the evidence which lead the District Court to hold that the restrictive covenant was overbroad and invalid. There was no legal authority for Court of Appeals to disregard this factually and legally correct determination and to theorize what may have been in the District Judge's mind as he performed his analysis.

Accordingly, the United States Court of Appeals for the Fifth Circuit erred in its failure to apply the clearly erroneous standard of review. The

District Court's factual findings were entitled to deference and nothing in the record mandated a holding that the finding was clearly erroneous.

For the above reasons, Petitioners respectfully request their Petition For Writ of Certiorari be granted.

Respectfully Submitted,

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Dated: November 16, 2009

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-30560

D.C. Docket No. 2:08-CV-185

ARTHUR J GALLAGHER & COMPANY,
Plaintiff - Appellant

v.

CLAYTON L BABCOCK; DENISE J ALEXI; MARIE G HARDOUIN; KRISTY COPELAND,
Defendants - Appellees

Filed 7/20/2009

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No.2:08-CV-185

Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: 8/26/09

No. 08-30560

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR J GALLAGHER & COMPANY,
Plaintiff-Appellant

v.

CLAYTON L BABCOCK; DENISE J ALEXI; MARIE G HARDOUIN; KRISTY COPELAND,
Defendants-Appellees

Filed 8/18/2009

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No.2:08-CV-185

ON PETITION FOR REHEARING

Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

No. 08-30560
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
ARTHUR J GALLAGHER & COMPANY,

Plaintiff-Appellant
v.

CLAYTON L BABCOCK; DENISE J ALEXI; MARIE G HARDOUIN; KRISTY COPELAND,

Defendants-Appellees

Filed 7/20/2009

Appeal from the United States District Court for the Eastern District of Louisiana
USDC No. 2:08-CV-185.

Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:*

In this interlocutory appeal, from the denial of a preliminary injunction concerning two contested contractual provisions underlying an action for declaratory judgment and other relief, primarily at issue is whether non-competition and non-

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

solicitation-of-customers provisions, expressly applying to all 64 of Louisiana's parishes, are invalid as a matter of law. The district court held them geographically overbroad *per se*.

Arthur J. Gallagher & Company challenges the denial of the preliminary injunction for the two provisions. Gallagher sought, *inter alia,* to enforce them against Appellees, who are former employees. The district court erred in holding these two provisions unenforceable as a matter of law. (Gallagher also sought to enforce confidentiality and non-solicitation-of-employees provisions. In response to the preliminary-injunction request, Appellees did *not* challenge the validity, as explained *infra,* of those provisions in district court, and its holding them valid is not at issue in this interlocutory appeal.) VACATED IN PART and REMANDED.

I.

Gallagher is an insurance-brokerage firm. In November 2003, it purchased a Louisiana-based insurance-brokerage firm from Appellee Babcock. The purchase included, *inter alia,* his customer lists and accounts; and the purchase agreement included provisions essentially designed to protect confidential information and to prevent Babcock from competing with Gallagher for two years after the sale.

In addition to the purchase agreement, Babcock signed an employment agreement with Gallagher; and he began working for Gallagher as a

vice president. The employment agreement contained covenants similar to those in the purchase agreement, including provisions preventing Babcock from competing with Gallagher for two years after termination of Babcock's employment.

When Gallagher purchased Babcock's business, Gallagher also hired the other Appellees: Copeland; and two former Babcock employees, Alexi and Hardouin. They signed "executive agreements" at the beginning of their employment with Gallagher, containing similar restrictive covenants.

In December 2007 and early 2008, Appellees left Gallagher to work for another insurance company. The litigation giving rise to the instant interlocutory appeal essentially concerns whether any of the above-referenced agreements have been violated.

In conjunction with this litigation, a temporary restraining order (TRO) pertaining to the agreements was granted on 8 January 2008; and, a preliminary-injunction hearing was held on 31 January. The requested preliminary injunction required the district court to address four types of provisions: non-competition, non-solicitation-of-customers, confidentiality, and non-solicitation-of-employees.

As noted, Appellees did not contest in district court the validity of the confidentiality and non-solicitation-of-employees provisions. (On the other hand, in the underlying litigation, they do contest

whether these provisions have been violated.) Because the January 2008 preliminary-injunction hearing was essentially limited to deciding validity *vel non,* however, the district court's subsequent ruling focused on the only two provisions for which validity was challenged: non-competition and non-solicitation-of-customers.

The order following the January 2008 preliminary-injunction hearing was not issued until June 2008. *Gallagher v. Babcock,* No. 2:08-CV-185 (E.D. La. 4 June 2008) (unpublished order and reasons). In that order, the district court did not expressly decide the requested preliminary injunction. Instead, it held: the non-competition and non-solicitation-of-customers provisions are *not* enforceable, as a matter of law, because they are geographically overbroad; the uncontested confidentiality and non-solicitation-of-employees provisions are valid; and the TRO is to remain in effect with respect to the valid provisions until the court decides the requested preliminary injunction.

II.

Accordingly, in June 2008, Gallagher filed this interlocutory appeal. It challenges the district court's invalidation, as a matter of law, of the non-competition and non-solicitation-of-customers provisions. Again, Appellees have not cross-appealed for the two types of uncontested provisions held valid (confidentiality and non-solicitation-of-employees).

On 17 June 2008, after this appeal was filed,

this action was transferred to another district judge. At the time of transfer, that judge was already presiding over a related action involving Gallagher and Babcock. Therefore, that day, the district court consolidated the two actions, and stayed the now-consolidated action, administratively closing it to await a ruling on this interlocutory appeal.

Because federal-court jurisdiction is based on diversity, Louisiana law applies. *E.g., Moore v. State Farm Fire & Cas. Co.,* 556 F.3d 264, 269 (5th Cir.2009). Whether the two provisions at issue are unenforceable as a matter of law is, of course, a question of law, reviewed *de novo. E.g., Team Envtl. Servs., Inc. v. Addison,* 2 F.3d 124, 126 (5th Cir.1993). Related factual findings are reviewed only for clear error. *E.g., Paulsson Geophysical Servs., Inc. v. Sigmar,* 529 F.3d 303, 306 (5th Cir.2008). Additionally, "[a]lthough the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo* ". *Id.* (internal quotation marks and citation omitted).

A.

Before addressing the provisions at issue in this interlocutory appeal, we must first decide whether we have jurisdiction. Gallagher rests our jurisdiction on a preliminary-injunction denial. *See* 28 U.S.C. § 1292(a)(1) (permitting interlocutory appeal of an injunction denial). The district court, however, did not expressly deny Gallagher's

preliminary-injunction motion. Instead, it decided: the non-competition and non-solicitation-of-customers provisions at issue on appeal are unenforceable as a matter of law; and the existing TRO shall remain in effect for the two uncontested provisions held valid until it reaches a final preliminary-injunction decision.

While not an express preliminary-injunction denial, this holding, in substance, amounts to such a denial with respect to the only two contested provisions: non-competition and non-solicitation-of-customers. *See H.K. Porter Co., Inc. v. Metro. Dade County,* 650 F.2d 778, 782 n. 7 (5th Cir.1981) ("[T]he district court's ruling on the TRO effectively foreclosed the relief requested in the preliminary injunction and was effectively a denial of the preliminary injunction".); *cf. Sampson v. Murray,* 415 U.S. 61, 86 (1974) (treating a TRO "continued beyond the time permissible under [Federal] Rule [of Civil Procedure] 65" as, in substance, a granted preliminary injunction); *Normand v. Research Inst. of Am., Inc.,* 927 F.2d 857, 866 (5th Cir.1991) ("Although the court did not expressly rule on [the motion at issue], its unequivocal judgment reflects an intent to dispose of the case completely and, inferentially, to reject the ... motion". (footnote call omitted)).

Along this line, as discussed, the underlying litigation involves four provisions (non-competition, non-solicitation-of-customers, confidentiality, and non-solicitation-of-clients). On the one hand, the district court has not yet expressly granted or denied

a preliminary injunction for any of them. On the other hand, in holding invalid as a matter of law the only two provisions for which validity was challenged (non-competition and non-solicitation-of-customers), the district court effectively rendered a final preliminary-injunction denial. Accordingly, we have jurisdiction.

B.

Concerning the two contested provisions, at issue are: their geographic scope; and, if needed, the availability of related severability clauses. As discussed, in part II.B.1., Louisiana law requires agreements like the non-competition and non-solicitation-of-customers provisions at issue to specify the parishes within which competition and solicitation are prohibited; agreements are invalid if they are geographically overbroad. And, as discussed in part II.B.2., invalid agreements containing severability clauses may permit such agreements to be salvaged; but, determining whether the invalid provision can be successfully severed depends upon identifying the specific offending language and assessing it in accordance with Louisiana law.

1.

Louisiana restricts, and narrowly construes, non-competition agreements and similar types of restrictive covenants. *E.g., SWAT 24 Shreveport Bossier, Inc. v. Bond,* 808 So.2d 294, 298 (La.2001) (noting that Louisiana has a "strong public policy restricting these types of agreements"). Along that

line, provisions like those at issue are invalid unless, *inter alia,* they satisfy Louisiana Revised Statute § 23:921(C). It provides, in relevant part:

> Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer *within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein,* not to exceed a period of two years from termination of employment.

LA.REV.STAT. ANN. § 23:921(C) (emphasis added).

As stated, the non-competition and non-solicitation-of-customers provisions were held unenforceable as geographically overbroad. Consistent with the above statute, however, these provisions do specify the specific parishes within which competition and solicitation are prohibited; each lists all of Louisiana's parishes by name. The district court viewed this as impermissible; among other things, it stated that it could "find no difference in listing all the parishes in the State from the situation presented in *Aon Risk* [*Services of Louisiana, Inc. v. Ryan,* 807 So.2d 1058

(La.Ct.App.2002),] where the court struck down a clause prohibiting competition in 'whatever parishes, counties and municipalities' the employer carried on business". In sum, the district court essentially found the provisions to be unenforceable *per se* because they named every Louisiana parish.

Although it is possible that these provisions are geographically overbroad, they are not overbroad *per se*. In that regard, the district court erred in holding them unenforceable without first considering evidence regarding the nature and extent of Gallagher's business. As the plain language of § 23:921(C) suggests, a factual inquiry is required to determine whether Gallagher "carries on a like business [within the specified parishes]". *See, e.g., Vartech Sys., Inc. v. Hayden,* 951 So.2d 247, 257-58 & n. 12 (La.Ct.App.2006) (considering whether non-competition agreements naming all of Louisiana's parishes were geographically overbroad, pursuant to § 23:921(C); and, requiring "evidence ... to establish where [plaintiff] actually had a location or had customers" for its analysis).

It is certainly possible for a company to conduct a like business in all of Louisiana's parishes; and, if that were the case, the plain language of § 23:921(C) provides for the protection of that company's interests. Louisiana's case law supports this conclusion.

For example, in *Moores Pump & Supply, Inc. v. Laneaux,* 727 So.2d 695, 698 (La.Ct.App.1999), a non-competition agreement covering 43 of

Louisiana's 64 parishes was held *not* to be overbroad, because the employer solicited business in each of the named parishes. In that regard, we see no difference between the statute's permitting listing 43 parishes and listing 64 parishes.

Similarly, in *Vartech Systems, Inc.*, 951 So.2d at 258, non-competition agreements naming all of Louisiana's parishes were examined. The court stated: "The listing of all 64 parishes does not automatically render the specification overly broad". *Id.* (citing *Hose Specialty & Supply Mgmt. Co., Inc. v. Guccione,* 865 So.2d 183, 188-89, 194 (La.Ct.App.2003)).

The district court, therefore, erred in its overbroad-*per-se* ruling. Instead, it should have considered evidence concerning whether Gallagher "carries on a like business", as defined by Louisiana law, in all of Louisiana's parishes. Accordingly, remand is appropriate so that the enforceability of the two provisions at issue can be evaluated. *See Commonwealth Life Ins. Co. v. Neal,* 669 F.2d 300, 304 (5th Cir.1982) (evaluation of Louisiana restrictive covenant involved an inquiry of both fact and law).

2.

The agreements contain severability clauses, essentially permitting unenforceable provisions to be "modified", "restricted", or "excised", with the goal of saving the remainder of the agreements. In its June 2008 order, the district court considered, and

rejected, possible means of saving the agreements.

This analysis was performed, however, in the light of the district court's incorrect determination that defining the geographic scope of the provisions' coverage by listing all of Louisiana's parishes was impermissible *per se*. In other words, its severability analysis flowed from an initial, incorrect assumption about what, precisely, made the provisions unenforceable. It is possible that this analysis would have been different had the district court's initial assessment of the language differed. *See SWAT 24 Shreveport Bossier, Inc.*, 808 So.2d at 309 (identifying "the offending language" in the agreement before considering whether the agreement could be saved).

As noted, remand is necessary so that the district court can address the provisions' enforceability. Needless to say, if any provisions are found to be unenforceable, a severability analysis should be performed.

C.

The parties raise several other issues, including, *inter alia*: whether the language of the agreements is adequate to create valid non-competition provisions; and whether Copeland's agreement was rendered unenforceable by a claimed missing attachment. Because the district court concluded these two provisions are overbroad as a matter of law, it never addressed these other issues. Accordingly, we decline to decide them for the first

time on appeal; they should be addressed on remand. *See, e.g., Spectators' Commc'n Network Inc. v. Colonial Country Club,* 253 F.3d 215, 225 (5th Cir.2001) ("[Because the issue] was not addressed squarely below, we remand for consideration in the first instance by the district court".).

Similarly, Gallagher claims the district court erred in refusing to admit certain depositions into evidence. On remand, the district court will, of course, have continued discretion concerning the admission of evidence, as it rules on the requested relief.

III.

As discussed, Appellees do not contest the validity of the confidentiality and non-solicitation-of-employees provisions. Accordingly, for the foregoing reasons, only the district court's ruling regarding the non-competition and non-solicitation-of-customers provisions is VACATED; and this matter is remanded to district court for further proceedings consistent with this opinion.

VACATED IN PART and REMANDED.

No. 2:08-CV-185
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ARTHUR J GALLAGHER & COMPANY,
Plaintiff
v.
CLAYTON L BABCOCK; DENISE J ALEXI; MARIE G HARDOUIN; KRISTY COPELAND,
Defendants

Filed 6/5/2008

ORDER AND REASONS

Before the Court is a Plaintiff's Motion for Preliminary Injunction. Rec. Docs. 1, 21. Defendants filed an Opposition, under seal. Rec. Doc. 52. Also before the Court is a Motion to Strike Plaintiff's Expert Witness, Expert Report, and Expert Affidavit. Rec. Doc. 29. Plaintiff filed an Opposition to the Motion to Strike. Rec. Doc. 33. The matters came for hearing with oral argument on January 31, 2008, and were taken under submission. Subsequent to the hearing, the parties were given additional time to file post-hearing briefs. Rec. Docs. 58, 59. The Court, having considered the arguments of the parties, the Court record, the law and applicable jurisprudence is fully advised in the premises and ready to rule.

I. BACKGROUND

In November 2003, Arthur J. Gallagher & Co. ("Plaintiff") and Clayton Babcock ("Babcock") entered into a Purchase Agreement under which Babcock sold Babcock Consulting, Inc., an insurance brokerage firm specializing in providing insurance benefits related services, to Plaintiff. The sale included all of Babcock's customer lists, expirations, renewal rights, broker relationships, accounts, books, records, correspondence, files and other data. Plaintiff also hired former Babcock employees Denise Alexi ("Alexi") and Marie Hardouin ("Hardouin"). In addition to the Purchase Agreement, Babcock signed an Employment Agreement with Plaintiff. Alexi and Hardouin signed Executive Agreements. Each of these Agreements contained terms purportedly restricting Defendants from competing with Plaintiff, soliciting Plaintiff's clients and employees and prohibited Defendants from disclosing confidential and trade secret information.

Babcock, Alexi and Hardouin began their employment with Plaintiff in January 2004. Babcock was the Area Vice President of Plaintiff's New Orleans Division of Gallagher Benefits Services, Inc. Alexi was a Marketing Coordinator and Hardouin was a Senior Account Executive. Subsequently, Kristy Copeland ("Copeland") was hired as a second Senior Account Executive. As part of her employment, Copeland also signed an Executive Agreement.

In December 2007, Copeland accepted a position with Ellsworth Corporation ("Ellsworth"), an insurance brokerage corporation and competitor of Plaintiff. On December 31, 2007, Babcock forwarded a letter of resignation to Plaintiff's corporate office. Shortly thereafter, in January 2008, Babcock left Plaintiff's employ and went to work for Ellsworth. However, prior to the letter of resignation and actual departure from Plaintiff's employ, Babcock filed a Petition for Declaratory Judgment regarding the validity of the restrictive covenants in his Purchase Agreement and Employment Agreement. That action was removed to this Court on January 10, 2008, and is currently pending before Judge Africk.

On January 2, 2008, Babcock officially resigned. Shortly thereafter, Alexi and Hardouin left Plaintiff's employ and went to work for Ellsworth.

The instant action ensued on January 8, 2008, alleging that each of the Defendants breached their respective Agreements by: (1) competing with Plaintiff; (2) soliciting Plaintiff's clients and customers; (3) soliciting Plaintiff's employees; and (4) taking, using, and disclosing Plaintiff's confidential information. *See* Rec. Doc. 1. Along with the Complaint, Plaintiff filed a Motion for Temporary Restraining Order. That Motion was heard with oral argument on January 8, 2008, and the Court granted a limited Temporary Retraining Order enjoining Defendants from: (1) divulging or making use of Plaintiff's confidential information; (2) soliciting employees of Plaintiff to leave and join

Ellsworth; and (3) soliciting prior and current customers of Plaintiff. Rec. Doc. 6.

Thereafter, the parties began preparing for the Preliminary Injunction hearing enlisting the Court's guidance when necessary. During a January 28, 2008, status conference and after discussing the issue with counsel for all parties, the Court ordered that the Preliminary Injunction hearing would address only the validity of the clauses at issue in the respective Agreements. Thus, the Court ordered that no argument would be considered on the merits of whether the Defendants actually breached their respective Agreements. *See* Rec. Doc. 53. Therefore, the only issue decided by this Order is whether the clauses relied upon in the respective Agreements are valid under Louisiana law. Oral Argument proceeded on the validity issue and at completion, each party proffered exhibits into the record concerning their respective positions. Post-hearing memoranda were also allowed upon request of the parties.

II. THE AGREEMENTS

A. The Purchase Agreement

The Purchase Agreement between Babcock and Plaintiff contains language which Plaintiff argues, prohibits Babcock from competing and soliciting for two years post-termination of his employment. The Agreement provides, in pertinent part:

Section 7. Covenants of Seller and the Stockholder.

Seller and the Stockholder jointly and severally covenant and agree with Gallagher as follows:

(f) Non-Competition. For a period of two years after the Closing date, Seller and the Stockholder shall not, directly or indirectly, compete in any way with the business of Seller to be transferred to Subsidiary pursuant to this agreement. For purposes of this paragraph, the term "compete in anyway with the business of the Seller" shall mean the entering into or attempting to enter into any business similar to that carried on by Seller or by Gallagher or Subsidiary. For a period of two years after the date hereof or after the date of the termination of his employment with Gallagher or any of its subsidiaries, whichever date occurs latest, the Stockholder will not, directly or indirectly, solicit, serve, sell to, divert, receive or otherwise handle insurance-related business with any individual, partnership, corporation, or association that (a) is, or within the last two (2) years was, a client or customer of Seller or (b) is a prospective client or customer of Seller in those parishes and

municipalities designated on Addendum II attached hereto. For the purposes of the covenant set forth in this section 7(f), the words "directly or indirectly" as they modify a prohibited activity shall include acting as an agent, representative or employee of any enterprise which so acts and includes any direct or indirect participation in such acting enterprise as a material creditor, owner, lender, partner, limited partner, joint venturer, or stockholder except as a stockholder holding less than one percent (1%) interest in a corporation whose shares are traded on a national securities exchange or quoted on NASDAQ.

...

To the extent the covenants set forth in this Section 7(f) or any word, phrase, clause, or sentence thereof (including any geographical or temporal restrictions contained in such covenants) shall be found to be illegal or unenforceable for any reason, such word, clause phrase or sentence shall be modified or deleted in such a manner so as to afford Gallagher and Subsidiary the fullest protection commensurate with making the covenant, as modified, legal and enforceable under applicable laws, and

> the balance of covenants, or parts thereof, shall not be affected thereby, the balance being construed as severable and independent.

Exhibit "A" attached to Rec. Doc. 7. Addendum II was attached to the Agreement and listed all the parishes in the State of Louisiana.

B. The Employment Agreement.

Babcock's Employment Agreement contained the following clause, which Plaintiff's argue, prohibit him from competing and soliciting:

> Section 8. Protection of Corporation's Business.
>
> (a) The Executive recognizes the Corporation's legitimate interest in protection, for a reasonable period of time following the termination of the Executive's employment, those Corporation accounts with which the Executive will be associated during his employment. Accordingly, the Executive understands and agrees that for a period of two (2) years following the termination of this employment for any reason whatsoever, he will not, directly or indirectly, solicit, place, market, accept, aid, counsel or consult in the renewal, discontinuance or replacement of any

> insurance (including self-insurance) by, or handle self-insurance programs, insurance claims, risk management services or other insurance administrative or service functions for, any Corporation account for which he performed any of the foregoing functions during the two-year period immediately preceding such termination in those parishes and municipalities designated on Addendum II attached hereto. For purposes of Sections 7 and 8 hereof, all references to "Corporation" shall be deemed to include the Acquired Business.

Addendum II was attached to the Agreement and included all of the Louisiana Parishes. *See* Exhibit "A" at p. 18 attached to Rec. Doc. 7.

The Employment Agreement also contains the following clause relating to solicitation of employees:

> Section 8. Protection of Corporation's Business
>
> (b) The Executive recognizes that employees of the Corporation are a valuable resource of the Corporation. Accordingly, the Executive agrees that, for a period of two (2) years following the terminations of his employment for any reason

whatsoever, he will not, directly or indirectly, solicit, induce, or recruit any employee of the Corporation to leave the employ of the Corporation.

Exhibit "B" attached to Rec. Doc. 7 at p. 9.

Babcock's Employment Agreement also contains a clause relating to disclosure of confidential or trade secret information and provides, in pertinent part:

> Section 7. Trade Secrets and Confidential Information
> ...
>
> (b) The Executive recognizes that by virtue of his employment by the Corporation, he will be granted prohibited access to confidential and proprietary data of the Corporation which is not known either to its competitors or within the insurance agency, consulting and brokerage business generally.
> ...
>
> The Executive recognizes that this Confidential Information constitutes a valuable property of the Corporation, developed over a long period of time and at substantial expense. Accordingly, the Executive agrees that he will not, at any time during his

> employment by the Corporation, divulge such confidential information or make use of it for his own purposes or the purposes of another.
>
> (c) The Executive recognizes the highly sensitive nature of the Confidential Information to which he will have access during his employment, and acknowledges the Corporation's legitimate interest in safeguarding same from disclosure. Accordingly, the Executive agrees that, for a period of two (2) years following the termination of his employment for any reason whatsoever, he will not divulge the Corporation's Confidential Information or make use of it for his own purpose or the purpose of another.

Exhibit "B" attached to Rec. Doc. 7 at p. 8.

C. The Executive Agreements of Alexi, Hardouin and Copeland.

Alexi, Hardouin, and Copeland's Executive Agreements contained the following clauses which Plaintiff argues are valid non-compete and non-solicitation clauses:

POST-EMPLOYMENT OBLIGATIONS OF THE PARTIES

Paragraph Fourteen.

A. The Executive recognizes the Company's legitimate interest in protecting, for a reasonable period of time following termination of the Executive's employment, those Company accounts and prospective accounts including the Acquired Business with which the Executive has been and will be associated during his employment. Accordingly, the Executive understands and agrees that for a period of two years following the termination of his employment for any reason whatsoever, he will not (i) directly or indirectly, solicit, place, market, accept, aid, counsel or consult in the renewal, discontinuance or replacement of any insurance or reinsurance bay, or handle self-insurance programs, insurance claims, or other insurance administrative functions ("insurance services") for, any Company account or actively solicited prospective accounts for which he performed any of the foregoing functions during the two-year period immediately preceding such termination or (ii) provide any employee benefit brokerage, consulting, or administration services, in the area of group insurance, defined benefit and defined contribution

pension plans, individual life, disability and capital accumulation products, and all other employee benefit areas ("benefit services") the Company is involved with, for any Company account or actively solicited prospective accounts for which he performed any of the foregoing functions within the Acquired Business Area during the two-year period immediately preceding such termination. The term Company account as used in this paragraph shall be construed broadly to include all users of insurance services or benefit services including commercial and individual consumers, risk managers, carders, agents and other insurance intermediaries and the accounts and prospective accounts of the Acquired Business. The term "Acquired Business Area" shall mean those parishes and municipalities designated on Exhibit A attached hereto. Exhibit A may, from time to time be amended by the parties without need to otherwise amend or restate this Agreement.

See Exhibit "C" attached to Rec. Doc. 7 at pp. 5-6, 19-20 and Exhibit "D" attached to Rec. Doc. 7 at pp. 2-3.

Attached to Alexi and Hardouin's Agreements was an Exhibit "A." This Exhibit listed all of the parishes in the State of Louisiana. *See* Exhibit "C" attached to Rec. Doc. 7 at pp. 14, 28. Copeland's Agreement, while referencing Exhibit "A," did not have the Exhibit attached when the document was executed.

Hardouin, Alexi and Copeland's Executive Agreements contained the following clauses relating to solicitation of employees:

> Paragraph Fourteen.
>
> ...
>
> B. The Executive recognizes that employees of the Company are a valuable resource of the Company. Accordingly, the Executive agrees that, for a period of two (2) years following the termination of his employment for any reason whatsoever, he will not, directly or indirectly, solicit, induce or recruit any employee of the Company to leave the employ of the Company.

See Exhibit "C" attached to Rec. Doc. 7 at pp. 5-6 and 19, 20 and Exhibit "D" attached to Rec. Doc. 7 at pp. 2-3.

Alexi and Hardouin's Executive Agreements also contained the following clause relating to confidential and proprietary information:

> Paragraph Thirteen. The Executive recognizes that the highly sensitive nature of the Confidential Information to which he will have access during his employment, and acknowledges the Company's legitimate interest in safeguarding same from disclosure. Accordingly, the Executive agrees, that for a period of two (2) years following termination of his employment for any reason whatsoever, he will not divulge the Company's Confidential Information or make use of its for his own purpose or the purpose of another.

Exhibit "C" attached to Rec. Doc. 7 at pp. 5, 19 and Sealed Proffered Exhibit "13" at p. 3.

III. LAW AND ANALYSIS

While the issues regarding the validity of the Agreements were raised in the context of a Motion for Preliminary Injunction, the Court and the parties agreed that prior to getting into the evidentiary issues of whether these Agreements were breached and whether a Preliminary Injunction should issue, the Court first must determine whether the aforementioned clauses are valid under Louisiana law.

Employees and employers may enter into non-compete and non-solicitation Agreements in limited circumstances controlled by Louisiana's statute. *See*, LSA-23:921. LSA-23:921 provides, in pertinent part:

> A(1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade or business of any kind, except as provided in this Section, shall be null and void.
>
> ...
>
> C. Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. An independent contractor, whose work is performed pursuant to a written contract, may enter into an agreement

> to refrain from carrying on or engaging in a business similar to the business of the person with whom the independent contractor has contracted, on the same basis as if the independent contractor were an employee, for a period not to exceed two years from the date of the last work performed under the written contract.

Louisiana has a longstanding strong public policy disfavoring non-competition agreements. *Louisiana Smoked Products, Inc. v. Savoie's Sausage & Food Products, 96-1716,p.* 11 (La.7/1/97), 696 So.2d 1373, 1379. Such agreements are severely restricted and narrowly construed. *SWAT24 Shreveport Bossier, Inc.* v. *Bond,* 808 So.2d 294, 298, 2000-1695 (La. 2001). Louisiana's strong public policy restricting these types of agreements is based upon an underlying state desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden. Because such covenants are in derogation of the common right, they must be strictly construed against the party seeking their enforcement. *SWAT 24,* 808 So.2dat298 (citations omitted); *Cellular One Inc. v. Boyd,* 94-1783 and 94-1784 (La. App. 1st Cir. 3/3/95), 653 So. 2d 30,33; *Comet Industries, Inc. v. Lawrence,* 23, 554 (La. App. 2nd Cir. 5/13/92), 600 So. 2d 85.

The statute provides exceptions to the general rule that such covenants are prohibited in

Louisiana. Agreements relying on those statutory exceptions, however, must strictly comply with the requirements of the statute. Therefore, any geographic limitation must be express and clearly discemable in order to fit into the statutory exceptions. *Hose Speciality & Supply Management, Co., Inc. V. Guccione,* 03-823, 865 So. 2d 183, 194 (La. App. 5th Cir 2003).

A. Non-Competition.

The parties initially dispute whether or not the language in Babcock's Purchase and Employment Agreements as well as the language in the Alexi, Hardouin and Copeland Executive Agreements are sufficient under the statute to prevent Defendants from competing with Plaintiff. Rec. Doc. 21 at pp. 14-18 and Rec. Doc. 52 at pp. 5-16. Plaintiff argues that the language in its respective Agreements has been characterized by Louisiana courts as creating a covenant not to compete because it describes the manner, nature or type of competition intended to be prohibited. Rec. Doc. 21 at pp, 15-16. In other words, Plaintiff argues that the failure to use the word "compete" does not invalidate the respective Agreements because they have adequately described and defined what they mean.

Defendants counter that the clauses are not non-compete clauses because they make no reference to "competition" or use any language similar to that used in the statute, i.e. "to refrain from carrying on or engaging in a business similar

to that of the employer." Rec. Doc. 52 at p. 9. Further, Defendants urge the language in the Agreements do not amount to a valid non-compete clause because they do not define "competition." Defendants submit that the Agreements contain only a non-solicitation clause, albeit overly broad, and therefore, cannot be both a non-solicitation and non-competition clause as Plaintiff suggests. Rec. Doc. 52 at p. 10.

The general rule is that non-competition clauses are invalid in Louisiana. LSA-R.S. 23:921 (C) defines the limited circumstances under which a non-competition clause may be valid. In addition to containing the requisite language for defining the type of work to which one is prohibited from engaging, the statute also requires that the clause contain specific geographical and time constraints for the exception to apply. All parities agree the time constraints are not at issue. Additionally, for purposes of its analysis, the Court assumes, without deciding, that the language relied upon by the Plaintiff in each of these Agreements amounts to non-compete language in that it appropriately defines the areas which Defendants are restrained from carrying on or engaging in a business similar to that of the Plaintiff.[1] Thus, the remaining issue

[1] The Court notes that the language in the first sentence of Paragraph (f), Section 7 of Babcock's Purchase Agreement is not at issue in this litigation. Defendants argue that this language is the only valid non-compete in all of the Agreements and by its own terms has expired because the two year time period runs from the date of closing forward. As the closing occurred on November 2003, Plaintiffs non-compete claim, according to Defendants, has expired. Plaintiff responds that

for the Court to consider is whether the geographic limitation contained in the Agreements is appropriately drafted in accordance with the statute.

The third sentence forward in Section 7 of Babcock's Purchase Agreement, Section 8 of Babcock's Employment Agreement and Paragraph 14 of the Alexi, Copeland and Hardouin Executive Agreements all provide that they agree not to provide the stated services in the parishes referenced in the attached Addendum II or Exhibit A for two years post-termination. All parties agree that Addendum 11 and Exhibit "A" is the list of the parishes in which Plaintiff intended to restrict Defendants' competition.[2] It is also undisputed that Addendum II as well as Exhibit A lists all parishes in the State of Louisiana.

Plaintiffs assert that this list complies with the statute because it clearly specifies the parishes in Louisiana in which it does business and provides that Defendants cannot compete in those parishes. Plaintiff explains that Gallagher Risk Management

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they are not invoking this provision in the Purchase Agreement and acknowledge that this section has expired by its own terms. In light of Plaintiff's position that they are not invoking the first sentence of Section 7 of the Purchase Agreement, arguments as to whether or not this particular section is valid are not considered.

[2] The Court acknowledges that Addendum II was not attached to Copeland's Agreement; however, since the court finds the clause invalid, it does not reach the issue of how the failure of Addendum II's attachment to Copeland's Agreement effects the analysis.

Services, Inc., a subsidiary of Plaintiff, provides insurance related services in all sixty-four parishes in Louisiana. Rec. Doc. 58 at p. 3. Further, Plaintiff explains that the actual employer of Defendants, Gallagher Benefit Services, Inc., performs insurance benefit services work and that Defendants performed such work for Plaintiff in nine parishes across Louisiana. Rec. Doc. 58 at p. 3. Anticipating an overly broad challenge. Plaintiff argues that in the event the Court finds that the parishes listed in Addendum II and Exhibit "A" are over broad, Louisiana law mandates that the Court sever the over broad provision, excise the offending language and enforce the Agreement without the offending language. Thus, Plaintiff suggest that in event the geographic limitation is overly broad that the Court strike all but the nine parishes listed.

Defendant counters that Louisiana law does not mandate that the Court sever and then reform grossly over-reaching provisions. Defendants argue that the provisions at issue here do not specifically list the parishes in which Plaintiff or Defendants performed work, but instead list all sixty-four parishes. Defendant suggests that such a "generic reference to an area, which then calls for interpretation, is invalid and must be stricken." Rec. Doc. 59 at p. 4. Essentially, Defendants argue the Court should not re-write the overly broad provision to create, supply, and insert a list of parishes that Plaintiff should have originally provided with its Agreement. Rec. Doc. 59 at p. 5. Accordingly, Defendants request the Court find the

provision null and void for lack of sufficient geographical restriction.

The breadth of geographic limitations has been the subject of controversy in non-compete and non-solicitation agreements for many years. In *Comet* v. *Lawrence,* 600 So. 2d 85 (La. App. 2nd Cir. 1992), the Louisiana Second Circuit Court of Appeal reviewed the trial court's denial of injunctive relief regarding a non-compete clause based upon a geographic limitation being too broad. The geographic restriction prohibited the plaintiff from competing against Comet "anywhere within the continental United States." *Comet,* 600 So. 2d at 87. The Second Circuit agreed that the non-competition clause was unenforceable as written because it failed to specify the "parish or parishes, municipality or municipalities or parts thereof wherein the employer carried on its business as mandated by the statute. *Comet,* 600 So. 2d at 87. The analysis did not end there as the contract, similar to the contract herein, contained a "savings clause" providing that any excessively broad language would be stricken to make the contract enforceable. *Comet,* 600 So. 2d at 87. The employer argued that although the contract as written was too broad and without effect, the court should, nevertheless, by virtue of the savings clause, revive the contract to apply to those twenty-four parishes in which the employer actually did business. The Second Circuit rejected this argument finding that a contract seeking to fit into an exception to the statute must strictly comply with its requirements

and because the contract did not so conform, the court declined to reform it. *Comet,* 600 So. 2d at 88.

In *Medivision, Inc. v. Germer, M.D.,* 617 So. 2d 69, 72 (La. App. 4th Cir. 1993), the court struck a geographic limitation which prohibited the employee from providing services at "any location within ten miles of any office of the Center..." The "Center" was defined as an "eye care center currently located at 3434 Houma Boulevard, Metairie, Louisiana and any future additional offices in the Greater New Orleans Area." *Medivision,* 617 So. 2d at 72. The court found that the phrases "office of the Center" and "greater New Orleans Area" vague and ambiguous. The court noted that the strong public policy against non-competition agreements and clarity required in the scope of the territorial limitations mandated a finding that the lack of specific territorial limitations in the agreement rendered it null and void because it failed to strictly comply with the terms of the statute. *Medivision,* 617 So. 2d at 73.

In *Water Processing Technologies, Inc.* v. Jgewaj, 618 So. 2d533, 534 (La. App. 4th Cir. 1993), the court reviewed a geographic limitation providing that the employee was prohibited from competing with the employer in the "State(s) of _____." The court found that the clause failed to specify the "parish or parishes, municipality or municipalities" to which it is applicable as mandated by statute. Because the territorial limits were not specified, the clause was invalid. That court refused reformation noting that while the

geographic limits could be inferred from other provisions in the agreement, it would not reform the agreement because the clause failed to strictly comply with the statute's specification requirement. *Water Processing,* 618 So. 2d at 536.

In *Team Environmental Services, Inc. v. Addison,* 2 F. 3d 124 (5th Cir. 1993), the U.S. Fifth Circuit, relying on Louisiana law, held that a geographic limitation that does not substantially conform with the statute by identifying with reasonable certainty those areas in which the employer lawfully may prohibit competition is invalid. In *Team Environmental,* the clause at issue prohibited the employee from acting in any competitive activity within a "two hundred mile radius of the Employee's base of operations at the time of termination." 2 F. 3d at 125. The Fifth Circuit found that the agreements on their face were invalid because the geographic limitation did not specify the parish or municipalities in which the employer did business and was prohibiting competition by the employee. The court next reviewed whether the agreements should be reformed based upon the savings clause. The court refused reformation as follows:

> An employee barred from plying his trade within 200 miles of his home would be far more hesitant to leave his job than if the proscription affected a substantially smaller area. This increased hesitancy obviously impacts the bargaining relationship

> with the current employer. Were courts to reform and enforce agreements like those at bar, employers would be free routinely to present employees with grossly overbroad covenants not to compete. While the employer presumptively would know that the agreement would be enforced only to the limit of the law, the employee likely would not. The result would be an impact on the employer-employee relationship not intended by the legislature when it enacted the 1989 amendments. That type expansion is a matter better addressed to the Louisiana Legislature.

Team Enviromnental, 2 F.3d at 127 (emphasis added). The court then found the clause null and void reversing the district court.

In *Kimball v. Anesthesia Specialists of Baton Rouge, Inc.* 00-1954, (La. App. 1st Cir. 9/28/2001); 809 So. 2d405, writs denied, 2001-3316 (La. 3/8/02); 811 So.2d 883, and 2001-3355 (La. 3/8/02); 811 So.2d 886, the Louisiana First Circuit was presented with a non-compete clause that failed to include any parish, parishes, municipality or municipalities. The court found the clause invalid and did not reform the agreement, despite that the contract contained a severability or savings clause and despite evidence presented that identified the parishes in which the employer performed operations. *Kimball,* 809 So. 2d at 412, 413. In so

finding, the court stated "...there is a failure to include specified geographic areas as statutorily required. We cannot simply rewrite the non-compete clause so as to make it comply with the statute. Also, because LSA-R.S. 23:921 requires specificity regarding geographical limitations, the non-compete clause must stand on its own. Reformation by parole evidence would violate the requirement of strict construction which must be applied to a non-compete clause." *Kimball,* 809 So. 2d at 413, 414 (citations omitted)

In *Aon Risk Services of Louisiana, Inc. v. Ryan,* 807 So. 2d 1058 (La. App. 4th Cir. 1/23/2002), the geographic limitation at issue provided that the employees could not compete in "whatever parishes, counties and municipalities" the employer carried on business. The court found that this general reference did not meet the specificity standard required by the statute. In so finding, the court stated:

> We believe that the legislature intended that the employee know on the front end what his potential restrictions might be and exactly what price he was being called upon to pay in exchange for employment. By specifying the parishes, etc. and requiring that the employer be doing business in them, the employee is not later caught in a position where he finds that he has given up much more than he bargained should his employer

> greatly expand the geographic range of his business after the agreement is executed. In that regard, the interpretation called for by the plaintiff in the instant case is merely an invitation to litigation. If we were to adopt plaintiff's reasoning why would any employer adopt any language other than language covering "any parish, municipality or parts thereof where the employer does business." That this is an absurd interpretation may be seen by the fact that it is really no different from saying "anywhere the employer does business," when the purpose of the statute is obviously to require the designation of some meaningful geographic limits.

Aon Risk Services, 807 So. 2d at 1062.

Recently, the Louisiana Fifth Circuit Court of Appeal found a non-compete and non-solicitation agreement invalid and unenforceable because the geographical restriction did not comply with the statute. *In Bell v. Rimkus Consulting Group, Inc. Of Louisiana* 2008-WL 787375, (opinion not released for publication), the agreement at issue contained a geographic restriction providing that the employee may not compete or solicit in the "Designated Geographic Area." "Designated Geographic Area" was defined as "any standard or consolidated metropolitan statistical area as those terms are defined by the United States Department

of Commerce" in which a client is located. *Bell,* 2008 WL 787375, *6. The court found this language did not comply with La. R.S. 23:921's strict mandate that the parish or parishes, municipality or municipalities, or parts thereof, be "specified." The court also rejected defendant's argument that the employees, because they were senior in the company, possessed sufficient information which would have allowed them to determine or at least request information regarding which areas were prohibited in the non-competition agreement because the statute did not contemplate such an action on the employee's part. Rather, the court found that the statute requires that "the parishes or municipalities be specified as an objective measure of the agreement's validity and for the employee to know and understand the limitations upon the signing of the agreement." *Bell,* 2008 WL 787375, *6. Applying a strict construction to the provisions of the agreement which refer to "Designated Geographic Area," the court found that the provisions fail to comply with statutory requirements. Further, the court, without detail, declined to reform the agreement. *Bell,* 2008 WL 787375, *6.

The consensus of this long list of precedent is that the courts will find a geographic limitation overly broad in those circumstances where the clause fails to comply with the statutory requirement of specificity. The Agreements herein are not specific and list all sixty-four parishes in the State of Louisiana. This Court can find no difference in listing all the parishes in the State from the

situation presented in *Aon Risk* where the court struck down a clause prohibiting competition in "whatever parishes, counties and municipalities" the employer carried on business. Nor is the current clause any different from listing the prohibited area as a "Designated Geographic Area" as in *Bell* or from designating no competition within a "two hundred mile radius of the Employee's base of operations at the time of termination" as in *Team Environmental.* This Court believes that listing all parishes in the state is the same as listing no parishes and therefore, does not meet the required specificity the legislature intended in the statute. Accordingly, the Court finds that the geographic limitations listed in Exhibit "A" and Addendum II are overly broad and therefore, null and void.

However, the analysis does not end because all of the Agreements contain severability clauses. The Alexi, Hardouin, and Copeland Executive Agreements provide:

> Paragraph Nineteen. The provisions of this Agreement are intended to be interpreted and construed in a manner which makes such provisions valid, legal and enforceable. In the event any provision of this Agreement is found to be partially or wholly invalid, illegal or unenforceable, such provision shall be modified or restricted to the extent and in the manner necessary to render such provision valid, legal and enforceable. It is expressly understood

and agreed between the parties that this modification or restriction may be accomplished by mutual accord between the parties or, alternatively, by disposition of a court of law. If such provision cannot under any circumstances be so modified or restricted, it shall be excised from this Agreement without affecting the validity, legality or enforceability of any remaining provisions.

Exhibit "C" attached to Rec. Doc. 7 at pp. 12, 26 and Plaintiff's Proffered Exhibit "13" at p. 7. Babcock's Employment Agreement contains the following clause:

Section 11. General.

(d) To the extent that the terms set forth in this Agreement or any word, phrase, clause or sentence is found to be illegal or unenforceable for any reason, such word, phrase, clause or sentence shall be modified or deleted in such a manner so as to afford the Corporation the fullest protection commensurate with making this Agreement, as modified, legal and enforceable under applicable laws, and the balance of this Agreement shall not be affected thereby, the balance being construed as severable and independent.

Exhibit "B" attached to Rec. Doc. 7 at p. 15.

In *Swat 24 Shreveport Bossier, Inc.* v. *Bond,* 808 So. 2d 294 (La. 6/29/2001), the Louisiana Supreme Court took up the issue of the scope of business activity allowed to be curtailed by a non-compete agreement. The court found that the statute's language required that an employer be allowed only to restrict an employee from "carrying on or engaging in the employee's own business similar" to that of the employer rather than allowing an employer to restrict the employee from all types of competition. *Swat 24,* 808 So. 2d at 306,307. Because the clause at issue in *Swat* restricted an employee from competition in his own business and with that of the former employer's competitor, the court found the language over broad and therefore, null and void. *Swat 24,* 808 So. 3d at 308.

The Louisiana Supreme Court next looked at whether the entire agreement should be declared null and void or whether the offending language should be excised and the remainder of the agreement allowed to stand. *Swat 24,* 808 So. 2d at 308, 309. Relying on the agreement's severability clause, the court severed the over broad language. After severance, there was nothing in the agreement that prohibited the conduct complained of by the employer and therefore, the court found the trial court correctly denied injunctive relief *Swat 24,* 808 So. 2d at 309.

Under the Louisiana Supreme Court's analysis in *Swat 24,* this Court must sever the overly broad language and then review the contract to determine if any valid prohibition exists. Striking the overly broad attachments leaves the Agreements with no territorial restriction whatsoever. Clauses that fail to specify any "parish or parishes, municipality or municipalities or parts thereof are invalid as written. *See Comet, 600 So. 2d at 87; Kimball,* 809 So. 2d at 412, 413. As such, when excising the offending the language, there is not any valid prohibition remaining as the clause does not comply with the strict and specific geographic exceptions listed in the statute. This Court, like the *Kimball* court, declines to re-write the Agreements, as suggested by Plaintiff, to encompass the nine parishes in which it now attests it does business. LSA-R.S. 23:921 requires specificity regarding geographical limitations and the non-compete clause must stand on its own. Reformation by parole evidence would violate the requirement of strict construction which must be applied to a non-compete clause. *See Kimball,* 809 So. 2d at 413, 414. The Court will not rewrite the Agreement to add back the parishes that the Plaintiff, after the fact, has decided it does business and would like to restrict Defendants from doing business within.

For the reasons stated, the Court finds that the Agreements at issue contain an invalid and overly broad geographic limitation in contravention to Louisiana law. The proposed non-compete

clauses in the Agreements are hereby declared null and void.

B. Non-Solicitation Clauses.

There are two non-solicitation clauses in the Agreements at issue. The first prohibits the Defendants from soliciting clients or customers of Plaintiff. The second prohibits Defendants from soliciting employees.

The non-solicitation clause relating to Plaintiff's clients and customers is the same clause relied upon for prohibiting Defendants from competing in the parishes listed in Addendum II and Exhibit "A," i.e. all sixty-four parishes in the State of Louisiana. For the reasons expressed *supra,* the Court finds that the clause is null and void under Louisiana law. Further, after severing the void paragraph in the respective Agreements, there remains no valid geographical restriction. It is against the statute and Louisiana law for no geographic limitation to be specified. Thus, the Court finds that the non-solicitation clauses in the respective Agreements, as they relate to the solicitation of Plaintiff's customers and clients, are invalid and overly broad.

Rendering the non-solicitation clause relating to the solicitation of customers/clients null and void, does not render the entire Agreement void. When the agreements contain a severability clause, the overly broad provision or language is stricken and a court must consider the effect of the agreement after

severing the language. *SWAT 24,* 808 So. 2d at 294. Here, after striking the offending language, paragraph (B) in the respective Agreements remain.[3] Those paragraphs, in sum, provide that Defendants shall not for a period of two (2) years following the termination of employment, "directly or indirectly, solicit, induce or recruit any employee" of Plaintiff to leave the employ of Plaintiff. *See* Exhibit "B" attached to Rec. Doc. 7 at p. 9; Exhibit "C" attached to Rec. Doc. 7 at pp. 5-6 and 19, 20; Exhibit "D" attached to Rec. Doc. 7 at pp. 2-3.

LSA-R.S. 23:921 is silent as to whether or not covenants restricting solicitation of employees are valid or invalid under Louisiana law. Further, Defendants do not dispute that the respective paragraphs in the Agreements prevent them from soliciting Plaintiff s employees; rather. Defendants argue the merits of this claim and submit that they have not solicited any of the former or current employees of Plaintiff. Plaintiff counters that the facts show Defendants have solicited employees.

The sole issue is the validity of the clauses in the respective Agreements. The Court finds that the non-solicitation clauses prohibiting solicitation of employees are valid under Louisiana law. As the hearing was limited solely to validity and no

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[3] The Purchase Agreement between Babcock and Plaintiff did not contain a restriction on soliciting employees post-termination. Thus, in this section, the Court is referring to only the Employment Agreement between Babcock and Plaintiff and the Executive Agreement between Hardouin, Alexi and Copeland and Plaintiff.

evidence or argument was taken on the issue of whether these Defendants should be preliminarily and/or permanently enjoined from acting as laid out in the Agreements, the Court leaves those issues for another day. This Order provides only that the non-solicitation clause in the respective Agreements are valid and that the Temporary Restraining Order enjoining Defendants from soliciting Plaintiff's employees remains in effect until a hearing and ruling on the Motion for Preliminary Injunction and/or Permanent Injunction is made.

C. Disclosure of Confidential Information.

The Agreements at issue also contain confidentially clauses. The Hardouin, Alexi, and Copeland Agreements prevent them from divulging Plaintiff's Confidential information or make use of it for their own purposes or that of another. *See* full text *supra,* Exhibit "C" attached to Rec. Doc. 7 at p. 5, 19 and Sealed Proffered Exhibit "13" at p. 3. Similarly, Babcock's Executive Agreement provides that, for a period of two (2) years following the termination of his employment for any reason whatsoever, he will not divulge the Plaintiff's Confidential Information or make use of it for his own purpose or the purpose of another. *See* full *text supra,* Exhibit "B" attached to Rec. Doc. 7 at p. 8.

LSA-R.S. 23:921 does not provide any prohibition against an employer preventing an employee from releasing or divulging confidential information post-employment. Further,

Defendants cite no law providing that such agreements are contrary to Louisiana law. Rather, Defendants argue the merits of the claim stating that they do not have any of Plaintiff s confidential, proprietary or trade secret information and that they are not making use of any such information for their own use or that of their new employer. Rec. Doc. 52 at p. 20. Plaintiff counters arguing that it has a "forensic analysis" of Babcock's computer which suggests that his computer was accessed on the last date of his employment and files containing confidential information were taken. Rec. Doc. 21 at p. 23-24. In response, Defendants have filed a Motion to Strike this expert's report.

Similar to the issue with the non-solicitation of employees, the Court deciphers no reason to find that these clauses are anything other than valid under Louisiana law. While the parties argue the merits of the whether or not the confidentiality clauses have been breached, the issue before the Court at this time is the validity of the respective Agreements; not the merits of any breach. Plaintiff has met its burden in showing that the confidential clauses are valid under Louisiana law. Accordingly, the Court finds only that the Confidentiality clauses in the respective Agreements are valid and the Temporary Restraining Order enjoining Defendants from divulging and making use of any trade secret information, proprietary information, and confidential information, including but not limited to, any business records, documents, and customer lists, of Arthur J. Gallagher & Co remains in effect

until such time as a hearing and a ruling on the Motion for Preliminary Injunction and/or Permanent Injunction occur.

Turning to Defendants' Motion to Strike, the sole issue decided on this preliminary injunction is whether or not the provisions in the Agreements are valid. Fact issues related to the breach of the confidentiality clause are not before the Court and will be decided either at or before trial. Accordingly, Defendants' Motion to Strike Plaintiff's expert whose opinion is directed to the breach of the Confidentiality Agreement is premature and dismissed without prejudice. Defendants may re-file the Motion at a later date.

II. CONCLUSION

For the reasons stated herein, the Court finds that the respective Agreements do not contain valid non-competition and non-solicitation of client/customer clauses under Louisiana law. The Agreements do contain valid non-solicitation of employee clauses and non-disclosure of confidential information clauses. Thus, the Temporary Restraining Order remains in effect as far as it pertains to those clauses in the Agreements.

Accordingly,

IT IS ORDERED that the Agreements do not contain valid non-compete and non-solicitation of client/customer clauses.

IT IS FURTHER ORDERED that the Agreements do contain valid non-solicitation of employee clauses and non-disclosure clauses and the Temporary Restraining Order enjoining Defendants from divulging and making use of, and making use of for his new employer or another, any trade secret information, proprietary information, and confidential information, including hut not limited to, any business records, documents, and customer lists, of Arthur J. Gallagher & Co., remain ins effect. The Temporary Restraining Order also remains in effect enjoining Defendants from soliciting, inducing, and/or recruiting employees of Arthur Gallagher & Company to leave Gallagher's employ and join Ellsworth Corporation.

IT IS FURTHER ORDERED that the Temporary Restraining Order shall remain in effect until the hearing on the Motion for Preliminary and/or Permanent Injunction and the ruling on such Motion is made, as laid out herein.

New Orleans, Louisiana day 4th June, 2008.